

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

SOLANO COUNTY PROBATION
DEPARTMENT,

Petitioner,

v.

WORKERS' COMPENSATION
APPEALS BOARD and PAULA
AGUILAR,

Respondents.

A129342

(WCAB Case Nos. ADJ4679982,
ADJ4289752, ADJ6833676)

The Workers' Compensation Appeals Board (Board) determined there should be no apportionment of permanent disability to nonindustrial (preexisting) causes in the underlying workers' compensation proceeding. We granted a petition for writ of review filed by the employer. We find the Board's determination was based on an assumption not supported by the record. We therefore annul the decision of the Board and remand for further proceedings consistent with this opinion.

STATEMENT OF FACTS

Respondent Paula Aguilar suffered injuries to her left shoulder, left elbow, low back, and left hip. The injuries arose in the course of her employment with petitioner Solano County Probation Department (Solano).

Peter Mandell, M.D., acting as an agreed medical examiner, examined Aguilar on at least four occasions and prepared several reports on her condition. In his first report,

dated in October 2002, Dr. Mandell noted that Aguilar had preexisting arthritis in her left hip. Dr. Mandell, however, concluded the arthritis was not symptomatic or disabling; therefore, in his opinion, all of Aguilar's hip disability should be apportioned to cumulative trauma from her work.

Dr. Mandell's opinion on apportionment in his October 2002 report was consistent with then existing law, which generally prohibited apportionment of disability based on causation or pathology. (See *E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (2006) 145 Cal.App.4th 922, 926 (*Yeager*)). In 2004, however, the Legislature substantially changed the law of apportionment. (*Ibid.*; see Lab. Code §§ 4663, 4664.) So when Dr. Mandell examined Aguilar again in January 2005 (after she had had hip replacement surgery), his report noted " 'new rules' " which might require apportionment. If so, he believed there was "disease and pathology" to apportion to the left hip disability. In his opinion, "approximately 2/3 of her disability is a direct result of cumulative trauma and 1/3 is the result of disease and pathology."

Dr. Mandell examined Aguilar once again in July 2005. At that time, Aguilar's primary concern was left shoulder pain. Dr. Mandell's report focused on Aguilar's shoulder disability. In his opinion, 100 percent of Aguilar's left shoulder disability was the result of cumulative trauma from her work.

In May 2006, Dr. Mandell prepared a report solely on the subject of apportionment. First, with respect to Aguilar's spine (back) disability, Dr. Mandell explained that "growing evidence in medical literature" showed obesity played a role in "spinal disease and spinal problems." He noted that Aguilar met the body mass index criteria for obesity. He believed that approximately 10 percent of Aguilar's spine disability was a "direct result of disease and pathology of obesity with the remainder going to cumulative trauma" As to apportionment of the left hip disability, he reaffirmed his earlier opinion that approximately one-third of the disability was the result

of disease and pathology (“67% of her disability is a direct result of cumulative trauma . . . with the remainder going to disease and pathology, including obesity”).

Dr. Mandell examined Aguilar again in November 2006. His opinions on apportionment remained unchanged. Ten percent of Aguilar’s spine disability was the result of disease and pathology due to obesity. Approximately 33 percent of her left hip disability was the result of obesity and arthritic degeneration. None of her shoulder disability was apportioned to disease or pathology.

Dr. Mandell discussed his opinions on apportionment at his deposition in August 2007. With respect to Aguilar’s left hip, he noted the arthritis in her hip had developed over a period of years. He explained that Aguilar’s disability was due in part to arthritis, and that from “a medical standpoint, there’s some basis for apportionment.” He believed her arthritis led to the need for hip replacement surgery.

Dr. Mandell prepared another report in June 2008. He had apparently been asked to “sub-apportion” the industrial part of Aguilar’s left hip disability between different time periods. He provided a mathematical formula for making that apportionment. He did not comment on or revise his opinion on apportionment to nonindustrial causes as to the left hip disability. He did, however, revise his opinion on Aguilar’s spine disability. He had seen new studies that had led him to question the connection between obesity and spinal problems. According to Dr. Mandell, “what used to be a medical probability is now a medical possibility, in my opinion.” He therefore decided Aguilar’s “spinal disabilities” should be apportioned only between industrial causes (a distinct injury and cumulative trauma).

The apportionment issues were submitted to the workers’ compensation judge (WCJ). The WCJ determined that none of Aguilar’s disability should be apportioned to nonindustrial causes. First, the WCJ believed Dr. Mandell had withdrawn obesity as a factor for apportionment: “Since Dr. Mandell withdraws any apportionment to obesity as to the back . . . , I assume he also meant to remove obesity as a factor of disability to

other body parts.” Second, the WCJ found Dr. Mandell’s opinions confusing because he combined obesity with arthritis when speaking of nonindustrial causation. Finally, the WCJ concluded Dr. Mandell had not sufficiently explained “ ‘how and why’ ” the preexisting factors caused disability, as required by Board precedent. The WCJ did not describe why Dr. Mandell’s explanation was insufficient.

The Board denied Solano’s petition for reconsideration.

DISCUSSION

We granted Solano’s petition for review, limited to the following issue: Does substantial evidence support the workers’ compensation judge’s assumption that the agreed medical examiner withdrew his apportionment determination as to respondent Paula Aguilar’s left hip injury?

The answer is no. After the law on apportionment changed in 2004, Dr. Mandell consistently attributed one-third of Aguilar’s left hip disability to nonindustrial causes (arthritis and obesity). He never wavered from that opinion. He never associated that opinion with his opinion on apportionment of Aguilar’s spinal disability. The June 2008 report the WCJ relied on for his assumption that Dr. Mandell was “remov[ing] obesity” as a cause of disability as to “other body parts” does not support that assumption. As noted above, the June 2008 report was prepared in response to a request to “sub-apportion the prior apportionment” he had assigned to cumulative trauma (industrial causes). Nowhere in the report did Dr. Mandell withdraw or change his opinion that one-third of Aguilar’s left hip disability was the result of nonindustrial causes. Only after discussing the left hip issues, did Dr. Mandell make an unsolicited correction to his opinion on the spine disability (“Incidentally, in looking over this material again, I do need to make a correction”). That correction was only to the apportionment of the spine disability.

As for the WCJ’s confusion regarding Dr. Mandell’s references to both obesity and arthritis, that confusion is irrelevant based on the medical record in this case.

Dr. Mandell referred to both obesity and arthritis as nonindustrial causes of Aguilar's left hip disability, so the removal of one factor (obesity) would not eliminate the other factor (arthritis). In reality and in any case, Dr. Mandell's reports and deposition testimony indicate the two factors were connected, with arthritis being the cause of hip injury and obesity being the cause, at least in part, of the arthritis (the arthritis was "due to obesity and things like that").

Finally, we find Dr. Mandell's reports and testimony adequately explain the basis for his opinions on apportionment under the standards set by this state's courts. "The medical opinion must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion, so that the Board can determine whether the physician is properly apportioning under correct legal principles." (*Yeager, supra*, 145 Cal.App.4th at p. 928; see also *Andersen v. Workers' Comp. Appeals Bd.* (2007) 149 Cal.App.4th 1369, 1381-1382.)

Dr. Mandell examined Aguilar several times. He documented his review of Aguilar's extensive medical record. The parties explored his opinions on apportionment both by requesting specific reports on apportionment and by questioning him on the concept at his deposition. His reports and testimony reflected that he understood the concepts of apportionment, even as he expressed some antipathy toward apportionment.

Dr. Mandell's opinion on apportionment was the only evidence in the record on the issue. There was no basis on which the WCJ could reject it or assume it away. A factual finding or decision is not based on substantial evidence if unreasonable, illogical, arbitrary, improbable, or inequitable considering the entire record and statutory scheme. (*Zenith Ins. Co. v. Workers' Comp. Appeals Bd.* (2008) 159 Cal.App.4th 483, 490.)

DISPOSITION

We annul the decision of the Board on apportionment of Aguilar's left hip injury and remand the matter to the Board to make a new award and finding on apportionment consistent with this opinion.

Sepulveda, J.

We concur:

Ruvolo, P. J.

Rivera, J.